COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PRINCETON DEVELOPMENT, INC.

v.

BEDFORD BOARD OF APPEALS

No. 01-19

DECISION

September 20 2005

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

In July 2001, Princeton Development, Inc., submitted an application to the Bedford Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 258 units of mixed-income, affordable, rental housing on a 50-acre site at 350 Concord Road in Bedford. Pre-Hearing Order, §§ II-1, II-2 (Oct. 4, 2004). The housing is to be financed under the 80/20 Program of the Massachusetts Housing Finance Agency (MassHousing). Pre-Hearing Order, §§ II-13; Applicant's Brief, p. 16. The developer and town officials had been involved in discussions concerning the proposal for some time, but had been unable to reach agreement. In particular, there was a dispute concerning the developer's right to cross an abandoned railroad right of way to access the development site. On July 18, 2001, the town of Bedford commenced an action in the Land Court seeking a declaration that it owned the abandoned right of way. At a public comprehensive permit

hearing on July 26, 2001, the Bedford Board of Appeals continued the matter, indicating that it would not consider the merits of the application and suggesting that until the developer provide evidence concerning ownership of or rights to the right of way, the jurisdictional requirements of 760 CMR 31.01(1)(c) would not be satisfied. On October 24, 2001, the Developer filed this appeal with the Housing Appeals Committee alleging that the continuance was unnecessary and constituted constructive denial of the permit.

After the opening hearing session before this Committee, a Conference of Counsel held pursuant to 760 CMR 30.09(4) on November 20, 2001, the parties, at the presiding officer's suggestion, filed cross motions. The developer asked that the Committee assert its power of *de novo* review or, in the alternative, remand to the Board with conditions limiting the scope of the Board's review. The Board asked that the Committee dismiss the appeal and the application for a comprehensive permit or, in the alternative, remand the matter with conditions supporting the Board's jurisdiction.

It is not uncommon for cases before this Committee to raise complex title issues that must ultimately be addressed by the Land Court. But since the Comprehensive Permit Law is designed to create an expedited process to facilitate the building of affordable housing, the Committee rarely stays its proceeding while those rights are adjudicated. Nevertheless, on January 22, 2002, because in this case the developer's claim was based upon a legal theory that it acknowledged created a case of first impression in Massachusetts, the presiding officer remanded the matter to the Board, indicating that it was not required to recommence the hearing process until after the issuance of a dispositive ruling by the Land Court.

On July 11, 2003, the Land Court issued a decision in the case of *Feltman v. Cerasuolo*, Land Court No. 273286, and entered a judgment establishing that the town owns

the abandoned right of way, but that the developer has an easement by implication across that land for all lawful uses, including the proposed development. The Town of Bedford appealed the Land Court judgment.

Nevertheless, in compliance with the Committee's Order of Remand, the Board resumed the local hearing, considering a modified proposal that consisted of 213 housing units in seven buildings. See Exh. 1 (p. 5), 3. By decision filed with the town clerk on May 24, 2004, the Board approved a comprehensive permit with conditions, notably reducing the size of the development to 156 units. On September 10, 2004, the developer filed with the Committee a notice of a further change in its proposal. See Exh. 2. Most significantly, it eliminated one of seven buildings from the proposal and reduced the size from 213 to 186 units. On September 15, 2004, the presiding officer heard argument on whether those changes were substantial under 760 CMR 31.03, and ruled that they were insubstantial.

On September 20, 2004, the Massachusetts Appeals Court vacated the judgment and remanded the matter to the Land Court. The Board renewed a previous request for a stay in the Committee's proceedings. On September 30, 2004, the presiding officer denied that request, ruling that despite the remaining ambiguity in the Land Court litigation, the developer had shown a reasonable expectation of being able to establish its right of access to the site.

On October 4, 2004, the Committee's hearing commenced, and seven days of *de novo* evidentiary hearing were held, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. A site visit was also conducted. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. JURISDICTION

The Board makes a brief, conclusory argument that because the exact nature of the developer's access to the site via easement has not been finally determined by the courts, it lacks site control, one of the jurisdictional requirements of 760 CMR 31.01(1). See Board's brief, pp. 5-6. But by the plain language of 760 CMR 31.01(1)(c), in order to establish jurisdiction the developer is only required to "control the site," not to have resolved all questions of access to the site. As is further clarified in 760 CMR 31.01(3), site control is a matter of ownership, not access, that is, "the applicant's interest in the site." Questions about access arise frequently in cases involving comprehensive permits, and this case is not unusual. Considering that a project eligibility determination has been issued by the subsidizing agency (Exhibit 15) and that there is no question about the developer's ownership interest in the site, and understanding the posture of the question of access in the courts, we rule that there is proper jurisdiction for the developer to this appeal. This is consistent with our ruling in *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 9-11 (Mass. Housing Appeals Committee Jun. 28, 1994), *aff'd,* No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997), which analyses this issue in more detail. And, as in that case, we are confident that any "lingering questions" about access would be laid to rest before any construction were to begin.

III. FACTUAL OVERVIEW

The proposed housing site consists of an approximately square front parcel of 3.6 acres, which has 370 feet of frontage on Concord Road (Route 62), and a rear parcel of 46.3 acres. Pre-Hearing Order, § II-2, see Exh. 2 ("complied plan of land"). These two parcels are separated by a 65-foot-wide abandoned railroad right of way owned by the town of Bedford, which is used for bicycling and hiking. *Id.* Both parcels contain a significant amount of wetlands. It is zoned for single-family residences on 30,000 square-foot lots. Exh. 1 (p. 9). The developer proposes to construct 186 units of rental housing in six buildings. Building No. 1 (30 units) and a small office building with a pool and "clubhouse" would be located on the front parcel, and the remaining five buildings on the rear parcel. There would be a 24-foot wide entrance driveway and 324 parking spaces.

IV. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed... make it impossible to proceed... and still realize a reasonable return [or profit] as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

There are several methods used by real estate professionals to estimate the return on rental housing development. These methods are all generally consistent, and yield similar, reasonably accurate estimates of profit. The simplest approach is to calculate the return on total cost (ROTC), which is the net operating income (NOI) in the first year of stabilized occupancy divided by total development cost (TDC). A more complex measure is the Internal Rate of Return (IRR), which imputes a rate of return by analyzing estimated cash flows over the entire life of the project (development costs, operating costs, rental income, and future sale). If future cash flows are known with any certainty, the IRR approach is the most accurate measure of investment return. But since future cash flows are typically projected from historical data, the results of an IRR analysis rarely differ substantially from an analysis of profitability based upon ROTC.

Finally, a third method is to analyze return on equity (ROE). This is the method that has been generally accepted by the Massachusetts Housing Finance Agency (MassHousing) and affordable housing finance professionals, and that we have used in our cases.[1] Tr. IV, 16-20; see *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 11 (Mass. Housing Appeals Committee Jan. 8, 1998); *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 11, 2003), *remanded on other grounds*, No. 03-03320 (Suffolk Super. Ct. Apr. 21, 2005).

Once the ROE is established for a particular proposed development, we must determine whether it is reasonable, that is, whether it is sufficient in the marketplace to

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1. An additional reason to use this methodology in calculating whether an anticipated return is reasonable under 760 CMR 31.06(3)(b) is that it is the same methodology used to determine, after construction, whether the developer's profit as a "limited dividend organization" is acceptable. The concept of a limited dividend organization appears in G.L. c. 40B, § 21, and is defined in 760 CMR 31.02. The definition refers to "dividend on invested equity."

induce the developer to invest its resources in pursuing the proposal. Although our regulation refers to a reasonable return "as defined by the applicable subsidizing agency," it is no longer the practice of subsidizing agencies to define such a return quantitatively. See *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee Jun. 15, 2005). The developer's expert testified that a figure of 10% has generally been in use as the minimum reasonable return since our decision in *Hastings Village*, but we are unwilling to use a standard that is 7 years old. See Tr. IV, 17-18. This is due, in part, to the fact that what level of return is reasonable varies over time depending on changes in interest rates in the financial markets. Thus, what level of return constitutes a reasonable return is a factual question that we must determine from the evidence.

The critical conditions in relation to economics are those that reduce the proposed development from 186 to 156 units. See Pre-Hearing Order, §§ II-8; Applicant's Brief, p. 14. To prove that these conditions render the development uneconomic, the developer retained an affordable housing finance consultant who analyzed the return on equity projected for a 156-unit development by preparing a *pro forma* financial statement.[2] Tr. IV, 14-15; Exh. 13.

The developer's expert testified in detail concerning the figures and calculations used to prepare that *pro forma*, and their accuracy was confirmed by the developer's chief executive officer. Tr. IV, 33-57; I, 126. The *pro forma* shows quite clearly that ROE in the first year of operation is only 1.8%, and that it rises uniformly, reaching 10.3% in year 13. Exh. 13; Tr. IV, 22. The expert concluded that that at this rate of return the 156-unit

2. This witness, Robert Engler, who has over twenty-five years experience in the affordable housing field, was also the developer's expert in *Hastings Village, Inc. v. Wellesley, supra.* Mr. Engler also prepared a *pro forma* using the ROTC approach. Exh. 14. This also indicated that the developer would not realize a reasonable return. Tr. IV, 64.

development is uneconomic. Tr. IV, 31, 57-58, 134. Specifically, he testified that the minimum reasonable REO in the first year would be 6.5%.[3] Tr. IV, 115-117, 124. His testimony remained convincing on cross-examination.[4] See Tr.IV, 67-134. The developer's chief executive officer also testified unequivocally that the reduction in size of the development from 184 to 156 units renders the project uneconomic. Tr. I, 127-128.

The Board has failed to cast doubt on these conclusions. It presented no witnesses to challenge the analysis of the developer's expert. Instead, it argues that "the only evidence presented... is that the project as approved with conditions will generate a positive return in the very first year...," and that this "is not a case where the conditions mean the project will be constructed or operate at a loss at any time," but rather a case where the developer "has failed to present evidence from which the Committee can discern the significance of the impact of the conditions on the return." Board's brief, p. 6. The first part of this argument need not be addressed at all since the standard that we are to apply on review is not whether the development as conditioned will generate *any* positive return, but whether it will generate a *reasonable* return.

The last part of the Board's argument is that the developer "cannot meet its burden simply by proving that the project as conditioned by the Board is uneconomic. It must prove that the conditions... cause it to be uneconomic." Board's brief, p. 7. That is, it argues that it was incumbent upon the developer to affirmatively prove that the proposal is economically

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3. There was inconclusive testimony concerning whether MassHousing has defined a minimum reasonable return of 10%, but nevertheless, the Board is incorrect in attributing to the developer the position that it "is entitled to a 10 percent return on equity." See Board's brief, p. 11.

4. We are not concerned about small inconsistencies in his testimony. See, e.g., Tr. IV, 83.

feasible at 186 units. Board's brief, p. 8. We believe, however, that this is unnecessary.[5] Clearly, the developer believes that the 186-unit proposal is economically feasible and it would not have presented that proposal to this Committee for approval if it did not. Tr. II, 24-26.

The developer's expert testified clearly that the ROE for the 156-unit development in the first year is 1.8% and that that renders the proposal uneconomic. Tr. IV, 31, 57-58; Exh. 13. We believe that that testimony is credible and accurate. The developer has sustained its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.

V. ISSUES

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7).

The conditions that are at the center of the dispute between the developer and the Board are those that require elimination of Building No.1, the building on the front parcel, closest to Concord Road.[6] See Condition 5.5[7]; Board's brief, p.14. The Board argues that

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5. In many cases, the developer may chose to introduce into evidence a *pro forma* for the larger development, in part to substantiate the underlying budgetary figures. We assume that the developer could have done so here, and its choice not to do so is in no way evidence that any of the figures in the 156-unit *pro forma* are suspect.

6. The condition permits a swimming pool and clubhouse and office building with six parking spaces to be built on the front parcel, so long as they comply with normal setback requirements. See Exh. 2 (sheet 2).

7. All conditions are found in Exhibit 1, pp. 50-61. Also see Pre-Hearing Order, §§ IV-3, IV-5.

there are a number of environmental concerns that are related to one degree or another that support the elimination of the building. Specifically, the Board raises concerns "related to wetlands, setbacks, drainage, and groundwater recharge, as well as... density and neighborhood preservation, traffic impact and public safety, and open space and recreational areas." Board's brief, p. 14.[8] We will address the on-site concerns first, since they are the most significant. We will address off-site traffic concerns separately.

A. On-Site Concerns

1. Protection of Wetlands Resources and Stormwater Management

The proposed development is in a sensitive area and will affect a number of natural water resources. The front parcel, on which Building No. 1 is located, is about three and one half acres, and includes nearly an acre and a half of wetlands. Exh. 2, 2-A, 3 (sheet 9); also see Tr. VI, 124-126; III, 53. The five buildings at the rear of the site are on 9 acres of upland, with wetlands behind and to the west. Exh. 2, 2-A, 3 (sheet 9); also see Tr. VI, 124-126. The large area of wetlands on the site behind the buildings is part of a much larger area upstream portion of the Elm Brook watershed. Exh. 3 (sheet 9); also see Tr. VI, 124-126, 139; III, 53; VII, 70, 79-80. Three different, formally designated conservations areas are directly contiguous to the site. Tr. VII, 76. To the east of the site, on an adjacent parcel, is a state-certified vernal pool. Tr. II, 13-14. Downstream of the site, Elm Brook has been designated as an area of core habitat under the state's living waters program. Tr. VII, 68.

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8. Sections IV-3 and IV-5 of the Pre-Hearing Order list many conditions as being in issue. Though we address a number of miscellaneous issues in Section V-C, below, those that were not briefed by the Board are waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995).

The site is also in the Zone 2 of a well-head protection area, though this is of little current significance since the wells are currently closed while contamination is being remediated. Tr. VI, 74-77.

The development is required, of course, to comply with the state Wetlands Protection Act, including the Department of Environmental Protection's Stormwater Management Policy. But Bedford has provided additional protection for its natural resources through a local Wetlands Protection Bylaw, which, in order to minimize stormwater damage and flooding and to protect wildlife habitat and other interests, has a number of requirements that are stricter than state law.[9] Specifically, it requires that undisturbed, natural vegetation be maintained within 25 feet of wetlands (a "no-disturb" buffer), and prohibits structures within 50 feet of wetlands. Exh. 4, 4-A (Regulations, § 2.2.2.2); see Conditions 3.1, 3.3, 3.4.[10] More important for the case at hand, in order to minimize flooding both by decreasing runoff and by increasing the area available for stormwater infiltration, it also limits the amount of impervious surface within 100 feet of wetlands to 25% of that area. Exh. 4, 4-A (Regulations, § 2.2.2.1); see Condition 3.2.

The Board argues that it has given serious consideration to the question of to what degree these local requirements can be waived without undue damage to local concerns, and while it has been willing to waive some provisions, its refusal to permit construction of

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9. The purpose of the bylaw is "to protect wetlands, related water resources, and adjoining land areas... by controlling activities... likely to have a significant or cumulative effect upon wetland values, including... public or private water supply, groundwater, flood control, erosion and sedimentation, control, storm damage prevention, water pollution, fisheries, wildlife habitat, state-listed rare plant species, recreation, aesthetics, and agricultural values...." Exh. 4 (art. 54.1).

10. Conditions 5.18 and 7.6 relate to snow storage, but the Board has not drawn our attention to any specific performance standard in the regulations in this regard. See Board's brief, pp. 22, 28; Exh. 4-A (Regulations § 2.2).

Building No. 1 is reasonable. Specifically, the Board notes that it has granted a waiver of the 25-foot no-disturb buffer to permit the wetland crossing to access the site and to create a secondary roadway for emergency vehicle access. Condition 3.1; also see Tr. III, 21. With regard to retaining walls, it did not waive the 25-foot no-disturb buffer, but it did grant a waiver of the 50-foot no-structures setback. Conditions 3.1, 3.3. The developer has complied by designing retaining walls to be built within the 50-foot setback, right at the edge of the no-disturb buffer.[11] See Exh. 2, 2-A. The developer has also complied with the condition requiring other structures to be set back 50 feet from the wetlands. But the Board denied a waiver of the 25% impervious surface requirement, specifically indicating that this required elimination of Building No. 1. Condition 3.2.

The proposed design is very aggressive in the manner in which it addresses environmental concerns related to the wetlands and other natural resources. For instance, not only will retaining walls of up to five feet in height be built to separate the apartment buildings from the wetlands, but in addition, they are very extensive, approaching half of the perimeter of the site. Tr. II, 159; Exh. 2, 2-A. Stormwater infiltration will be achieved by means of large underground storage tanks, which will require the introduction of 30,000 and 50,000 cubic yards of fill to raise the ground level sufficiently so that they will function.[12] Tr. II, 152, VI, 95-99.

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11. There are, in fact, several small intrusions (totaling several hundred square feet) into the 25-foot no-disturb buffer by retaining walls on the rear portion of the site. See Tr. II, 123-131; Exh. 2-A. These appear to be essential to permit the siting of the buildings on the rear portion. They are not significant enough that they should stand in the way of construction of these buildings. See our condition in Section VI-2(c), below. They do, however, lend support to the Board's argument that the impact of the entire development should be reduced by elimination of Building No. 1.

12. There was a great deal of testimony by the Board's stormwater engineer about the problems and disadvantages of such a system. See, e.g., Tr. VII, 15-26. We need not address these since they will be subject to review under the Wetlands Protection Act.

Though Building No. 1 and the five buildings at the rear of the site are isolated from each other by the abandoned railroad bed, both contribute to the overall environmental impact of the proposed development. By granting the comprehensive permit for a five-building development, the Board has made the judgment that if only those buildings are constructed, the total impact on local concerns will be outweighed by the regional need for housing. But in considering whether the Board's decision to eliminate Building No. 1 is justified, we must weight the impact of the entire, six-unit development on all of the resources in the area.

In this regard, the town's public works engineer, who specializes in civil and environmental engineering, testified concerning several issues. She did not testify explicitly concerning the elimination of Building No. 1, but rather with regard to flooding to the rear of the site. Elm Brook is a source of major flooding problems, flooding homes and yards and requiring street closures. Tr. VI, 78, 82; Exh 54. She testified that the town is currently engaged in a mitigation effort, but that the flooding problems will worsen nevertheless when the development is built. Tr. VI, 88, 80. She specifically concluded that even though the development will comply with the state Stormwater Management Policy, because of the particular circumstances in this area, she believed that a higher, local standard should be applied. Tr. VI, 90-91, 96-98.

The Board's expert stormwater engineer confirmed the existence of the flooding problem, and testified that though he "did not single out any one building versus another," the removal of a building would improve the situation. Tr. VII, 27-28, 31, 33-34. In his written report, he concluded that "more conservative design assumptions must be applied to

the proposed system of stormwater management and controls to ensure long term protection of the health and safety of downstream measures [sic]." Exh. 59 (p. 4), also see Tr. VII, 63.

The testimony of these witnesses was not rebutted by that of the developer's environmental expert. His testimony focused on state regulations, and not on the additional local bylaw requirements and the interests they protect. The Developer's expert testified that assuming the "total impervious area associated with Building No. 1, including the structure itself and the parking areas is 8,273 square feet," it would not adversely affect the surrounding resource areas. Tr. III, 23-24. He based this on three factors: first, that the wetlands on the front parcel drains under Concord Road, away from the other wetlands; second, that the total watershed of which it is a part is two square miles; and third, that the project will comply with DEP Stormwater Management Policy. Tr. III, 25. His credibility was undercut considerably, however, since the underlying assumption of an area of 8,273 square feet, based on calculations by another person, is grossly inaccurate. A cursory glance at Exhibit 2-A shows that the actual area is several times as big. The Board's engineer estimated it to be a full acre. Tr. VI, 81. The irregularly shaped building alone is about 200 feet long and up to 70 feet wide, and covers an area greater than 10,000 square feet. Exh. 2, 2-A. The 56 parking spaces alone, not including any of the driveways, cover over 8,000 square feet if their size is estimated conservatively as eight by eighteen feet. Exh. 2-A. On cross-examination, the witness acknowledged the error, and he responded by noting that even at a much larger size, the new impervious area was still only a small percentage of the entire watershed. Exh. III, 54-57.

We find that the overall impact of the proposed six-building development—as designed in violation of the local bylaw which limits impervious surface to 25% of the area

of the 100-foot wetlands buffer—constitutes a local concern sufficient to outweigh the regional need for housing, and, thus, justifies the conditions imposed by the Board that require the elimination of Building No. 1.

2. Density, Open Space, and Recreational Area

The Board makes several arguments with regard to the density of the development and open space. For the most part, however, these are too general to support its reduction in the size of the development. For instance, it discusses other developments approved in town as support for what appears to be an arbitrarily imposed limit of twelve units per buildable acre. See Condition 1.2; Board's brief, p. 18; Tr. VI, 104-107. That argument is of little avail since, as we have noted frequently in our decisions, it is not sufficient in the context of the Comprehensive Permit Law to simply quantify density; rather, there must a more sophisticated analysis of the proposed design and its relation to the site and surrounding areas. *Hastings Village, Inc. v. Wellesley,* slip op. at 20-31, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999); *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee June 25, 1992); also see *Pyburn Realty Tr. v. Lynnfield*, No. 02-23 (Mass. Housing Appeals Committee, Mar. 22, 2004). The same is true of 50-foot setbacks from property lines. See Condition 1.4; also see, e.g., *Woodridge Realty Tr. v. Ipswich*, No. 00-04, slip op. at 13 (Mass. Housing Appeals Committee, Jun. 28, 2001).

Nevertheless, the Board does make one argument that is quite specific. That is, it cannot be disputed that eliminating Building No. 1 will "increase the buffer area around the bike trail going down the former railroad right of way." Tr. VI, 140. Because of the rural nature of this trail, the planning director's testimony that there is significant value in

maintaining that vegetated buffer is credible. Tr. VI, 141; cf. *Cloverleaf Apts., LLC v. Natick*, No. 01-21, slip op. at 15 (Mass Housing Appeals Committee Dec. 23, 2002). Standing alone, this argument would not be sufficient to justify the elimination of Building No. 1, if for no other reason than that there will little or no buffer from the five buildings on the rear of the site. But it does lend support to the Board's position.

3. Neighborhood Preservation

The Board argues that a large residential building near Concord Road will be out of character with the surrounding low density residential neighborhood, and that removing it from the plan and retaining vegetation instead "will help to screen the site and help it to fit in better visually in terms of the neighborhood." Tr. VI, 139. This, too, is a legitimate concern, though the Board introduced no evidence to show exactly how great the concern is in this location. Thus, it adds support to the Board's position, but to a very limited degree.

4. Master Plan

The Board makes an additional, somewhat opaque argument with regard to density. Citing our decision in *Harbor Glen Assoc. v. Hingham*, No. 80-06 (Mass. Housing Appeals Committee, Aug. 20, 1982), it argues that limitation of the development to twelve units per buildable acre should be upheld since "the town has developed a Master Plan which, consistent with 'smart growth policies,' envisions higher density mixed-use developments with an affordable housing component in densely-developed business and industrial districts and lower density developments on scattered sites in residential districts."[13] Board's brief, p. 17; also see Tr. VI, 107-111. The flaw in this argument is that the 156-unit development that

13. Though the town's Comprehensive Affordable Housing Plan is an exhibit in this case, the Board did not introduce the master plan into evidence. See Exh. 30, 38. Nevertheless, we will assume that the Board's characterization of the plan is accurate.

it approved is inconsistent with the master plan smart growth provisions that it cites. Since the Board already made the judgment to waive those principles, it cannot be heard to argue that the same principals require the removal of a single, 30-unit building.

B. Traffic

The proposed development will add traffic to an already congested highway. Formally, the Board has continued to press an argument that traffic concerns are sufficiently great to justify the elimination of Building No. 1. Board's brief, pp. 15-16. As a practical matter, however, we cannot fail to notice that less than a page (one paragraph) of the Board's brief was dedicated to this argument, while the Brief contains more than eleven pages of argument in support of mitigation measures that the Board imposed by condition.[14] Board's brief, pp. 15-16, 32-43. This is perhaps a reflection of the evidence that was introduced at the hearing. There was a great deal of testimony and documentary evidence concerning existing traffic problems related to volume and also to mitigation of safety concerns—certainly enough to show that the Board's general concern with regard to traffic is understandable. But there was little evidence that clearly quantified the impact of additional cars in a way that addresses the Board's burden of proof in this hearing. That is, the Board must show that the traffic impact specifically attributable to the proposed 186-unit development is sufficiently great to outweigh the need for affordable housing. 760 CMR 31.06(7). This is particularly difficult since it has approved a 156-unit development, thus conceding that the impact from that amount of housing is acceptable.

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14. We address the individual conditions in Section V-C, below.

To meet its burden, the Board focused on an intersection on Concord Road known as the Wilson Park triangle, which is approximately one and a half miles from the site. Tr. VI, 27. This is "one of the worst intersections in Bedford," and is currently is operating beyond its designed capacity. Tr. VI, 139, 28; V, 33. It is the location where Concord Road (which is an arterial roadway carrying 14,000 vehicles per day) intersects with Great Road and North Road in three separate, unsignalized intersections which surround a large triangular island. Tr. V, 13-14.

The developer's traffic expert conducted a full study of the roads surrounding the site, including Wilson Park triangle, and concluded that even if the development consisted of 213 housing units, "the additional traffic that this project would generate would result in a measurable but minor impact on operating conditions" at the intersection. Tr. V, 21, 36; Exh. 17 (p. 17), 21.

The Board's traffic engineer reviewed the work of the developer's expert, and also focused on the Wilson Park triangle. Tr. VI, 21, 27-37. He disagreed with the methodology used by developer, suggesting that the triangle be analyzed as three separate intersections. Tr. VI, 29, 32; also see V, 38; Exh. 55. He did not conduct his own analysis. Tr. 32, 38.

The developer's expert also compared the impact of different sized developments, and concluded that there would not be a perceivable difference in impact between a 186-unit development and the 156-unit development...." Tr. V, 40-42, 129. The Board did not offer evidence to compare the two developments other than the testimony of the Board's expert on cross-examination, and that testimony—that "any impact on Concord Road approaching Wilson [Park] triangle in the eastbound direction is significant"—is neither specific nor convincing. See VI, 51-52, 68-70.

The Board would rely on the commonsense logic that "eliminating Building No. 1 will help to decrease the traffic impact on that very difficult intersection." Tr. VI, 139; V, 50. That is not sufficient, however. The Board has failed to sustain its burden since it has not shown a specific, measurable difference in impact resulting from the elimination of 30 housing units that outweighs the regional need for housing.

C. Miscellaneous Conditions

The Board's decision also contains a number of miscellaneous conditions that have been challenged by the developer. The Board argues that even though the Committee has found that the Board's decision renders the proposal uneconomic, it cannot modify conditions that do not bear directly on the size of the development. Board's brief, p. 9-10. This is not the law, however, since our precedents indicate that the proper interpretation of G.L. c. 40B, § 23 and 760 CMR 31.06(7) and 31.08(1)(b) is that the conditions are to be reviewed in aggregate to determine whether they render the proposal uneconomic, and if so, each condition contested by the developer is to be reviewed to determine if it is consistent with local needs.[15] See, e.g., *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). This is also reflected in the section IV-6(b). of the Pre-Hearing Order. We will therefore consider the conditions individually (or in related groups).

Conditions 4.1 and 4.2 (fees for building, plumbing, and electrical permits and for water and sewer connections) - In the absence of an allegation that they have been assessed

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15. A more difficult question is presented in situations in which we have found that the conditions imposed do *not* render the proposal uneconomic. But even in that case, we will engage in a much more limited review of the conditions. For a full discussion, see *Archstone Communities Trust v Woburn*, No. 01-07, slip op. at 20-21 (Mass. Housing Appeals Committee, Jun. 11, 2003);

inequitably, the town's need to offset operating costs is sufficient justification for routine fees related to construction. See *Messenger Street Plainville Senior Housing Development Partnership v. Plainville*, No. 99-02 (Mass. Housing Appeals Committee Oct. 18, 1999). Further, the developer's reliance on the Board's decision to waive such fees for another development built under the Comprehensive Permit Law is misplaced since G.L. c. 40B, § 20 requires that local requirements be applied equally to subsidized and non-subsidized housing, not to all subsidized housing. Therefore, this condition will remain in effect.

Condition 7.5 (mosquito control) - Treatment of individual catch basins once per year for mosquito control is simple and inexpensive. This condition will remain in effect, though the developer shall not be required to take steps beyond those described during the testimony of the town's public works engineer. See Tr. VI, 84. It may even be possible to bring the catch basins in the proposed development within the municipal program in return for a one-time cash payment or some other accommodation. The parties are encouraged to pursue such a cooperative solution.

Condition 8.1, 8.3, 8.4, 8.5, 8.7, and 8.8 (crosswalk, flashing signs at crosswalk, entrance and stop sign, sidewalk on Concord Road, and crossing of former railroad bed) - These conditions require the developer to make safety improvements that will benefit both the town and the residents of the proposed development. See Tr. V, 56-57; VI, 22. Such improvements are generally associated with a development of this sort, and the conditions are reasonable. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 36 (Mass. Housing Appeals Committee Jun. 25, 1992). The conditions will remain in effect.

Peppercorn Village Realty Tr. v. Hopkinton, No. 02-02, slip op. at 16-17 (Mass. Housing Appeals Committee Jan. 26, 2004).

Condition 9.10 (funding for crossing guard) - Placement of a school crossing guard on Concord Road is certainly prudent from a safety standpoint. Tr. V, 56-57. Whether this should be funded by the developer or whether it is a municipal service that should be provided by the town is less clear. The limited testimony on this matter implies that there is consistent town policy requiring that developers of new housing pay for crossing guards when they are necessary. Tr. VI, 26. The developer did not contest this condition specifically, and therefore we find that the Board has presented sufficient support for the condition so that it will remain in effect.

Condition 8.6 ($28,000 payment for intersection improvement study) – The developer offered to pay $25,000 to the town as a contribution toward an engineering study of possible improvements at the Wilson Park triangle. Exh. 25. This was clearly intended as part of an offer to settle this controversy, and was conditioned on the approval of 186 or more housing units. Tr. V, 44; Applicant's Brief, pp. 47-48. As discussed in Section V-B, above, the Board has not proven a significant local concern at the Wilson Park triangle resulting directly from the 30 housing units in dispute here. But in any case, under the standard stated in our decision in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 37 (Mass. Housing Appeals Committee Jun. 25, 1992), we conclude that the Board has not proven that this development will result in a sufficient increase in traffic volume to justify a payment of this magnitude. Therefore, the condition will be stricken.

Condition 9.7 ($25,783 payment toward Norma Road pumping station improvements) - The condition requiring payment to make pumping station improvements is similar to Condition 8.6, which requires payment for a traffic improvement study. The Board, however, introduced very little testimony with regard to the underlying need. The town's public works

engineer testified that the pumping station currently operates within its designed capacity and will continue to do so after the 156-unit development is brought on line. Tr. VI, 85. The Board argues that even though there is no current problem that needs attention, the developer should contribute to the station's eventual replacement. That is, if the pumping station were to remain below its designed capacity, the pumps would not need to be replaced for many years, but because the new development will add flow, the pumps will wear out sooner. Board's brief, pp. 43-44; Tr. VI, 86. Even when there is an existing problem, however, "it is impractical and unfair to obligate [a developer] to pay for improvements far in the future." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 37 (Mass. Housing Appeals Committee Jun. 25, 1992). It would be doubly unfair to require the developer to pay without a showing that the proposed development stretched the pumping station beyond its designed capacity. A similar argument could be used to require all developers to make advance payments for road resurfacing simply because the traffic new developments generate causes roads to wear out more quickly. The Board has not demonstrated sufficient support for Condition 9.7, and therefore it is stricken.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Bedford Board of Appeals is consistent with local needs in that the conditions that have been proven to render the proposed development uneconomic are supported by valid local concerns which outweigh the regional need for housing. The decision of the Board is affirmed, though the Board is directed to remove or modify certain conditions in the comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the permit filed by the Board with the town clerk on May 24, 2004 except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 156 total units, of which 20% shall be affordable, shall be constructed as shown on drawings by Noonan & McDowell, Inc. ("Princeton at Bedford"), Sep. 20, 2003, rev. July 28, 2004 (Exh. 2, 2-A).

(b) Prior to commencement of construction, all plans shall be approved under the state Wetlands Protection Act, including the DEP Stormwater Management Policy.

(c) With regard to the Bedford Wetlands Protection Bylaw and Regulations, the five buildings on the rear parcel may be constructed as shown on Exhibit 2-A, despite small intrusions (totaling several hundred square feet) by retaining walls into the 25-foot no-disturb buffer.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: September 20, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

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